

25 JULY 1994



Personnel

DISCRIMINATION COMPLAINTS

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

NOTICE: This publication is available digitally on the SAF/AAD WWW site at: <http://afpubs.hq.af.mil>. If you lack access, contact your Publishing Distribution Office (PDO).

OPR: AFPOA/DPW
(Mr. Vincent L. Johnson, Jr.)
Supersedes AFR 40-1613, 25 September 1981

Certified by: HQ USAF/DPC
(Mr. John Graham)
Pages: 10
Distribution: F

This instruction tells counselors and commanders how to process complaints of discrimination based on race, color, religion, sex, national origin, age, sexual harassment, or disability. Use it with the policies and guidance of the Equal Employment Opportunity Commission (EEOC) published in Title 29, Code of Federal Regulations (CFR), Part 1614; EEOC Equal Employment Opportunity (EEO) Management Directive (MD) 110; and applicable statutes. This instruction applies to Air Force employees aligned under the National Guard Bureau according to Title 5, US Code (U.S.C. Part III), it does not apply to Air National Guard Technicians (administered by the National Guard Bureau under Title 32 U.S.C. Section 709), private contract employees, active duty military members, Army and Air Force Exchange Service employees or non-U.S. Citizens employed by the Air Force outside the U.S.

SUMMARY OF CHANGES

This issuance aligns the instruction with AFPD 36-12.

Section A—Processing Individual Complaints

1. Pre-complaint Processing (29 CFR 1614.105 and EEO MD-110). An aggrieved person who believes s/he has been discriminated against on the basis of race, color, religion, sex, national origin, age, sexual harassment or disability must consult an EEO counselor before filing a formal complaint. The initial contact must be within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the personnel action. The 45-day limit may be extended for reasons outlined in **29 CFR 1614.105 (a) (2)**.

EEO Counselors must:

- Advise individuals in writing of their rights and responsibilities (**see sample checklist in EEO MD-110**).
- Place all allegations of discrimination from eligible employees, former employees or applicants in the pre-complaint process, regardless of timeliness, merit, or other considerations.

- Submit a narrative report to the chief counselor within 5 days from the date the complainant filed the formal complaint. Document in the report any time the complainant mentions compensatory damages (see sample in EEO MD-110).
- Use other ways of resolving disputes whenever possible.
- Complete pre-complaint counseling within 30 days or obtain written approval from the complainant and the chief counselor to extend counseling for no more than 60 days (29 CFR 1614.105 (e)).

Advise the complainant in the final interview letter to file any formal complaint with the chief counselor or local commander within 15 days of receipt of this letter (see sample letter in EEO MD-110). You may wish to attach a copy of DD Form 2655 Complaint of Discrimination in the Federal Government, to the final interview letter. Do not attempt in any manner to dissuade the person from filing a complaint.

2. Complaint Processing (29 CFR 1614.106). A complaint must be filed with the Base that allegedly discriminated against the complainant. The complaint must be signed by the complainant or the attorney. It should generally describe the action or practice that form the basis of the complaint. Chief Counselors(CCD) process complaints and dismissals.

2.1. To process complaints, CCDs must:

- Review and perfect the issues
- Complete the DD Form 2655 if the complainant did not.
- Advise the complainant, in writing, of receipt of the complaint, date complaint was filed, and the right to appeal the final decision or dismissal of all or portions of the complaint (29 CFR 1614.106 (d))
- Provide the counselor's report to the complainant within 15 days of the date the complainant files the formal complaint.
- Submit copies of the report to the civilian personnel office (CPO) and staff judge advocate (SJA) who simultaneously review it for soundness and the possibility of resolving the complaint.
-
- Assign a docket number and annotate the date filed in the space marked "For Agency Use" on the DD Form 2655, and construct the nine-digit base docket number as follows:

-2-digit servicing civilian-personnel-flight identifier,

-2-digit servicing MAJCOM identifier,

-2-digit current fiscal year,

-3-digit chronological sequence number starting with 001 at the beginning of each fiscal year. For example:

--Identifier for Hanscom Air Force Base: LK

--Identifier for Air Force Materiel Command: 1M

--Current Fiscal Year: 94

--Chronological Sequence Number: 001

--Base Docket Number: LK1M94001

- Notify the complainant and representative of the docket number and instruct them to refer to it in all correspondence.
- Request an investigator from the Office of Complaint Investigations (OCI) NLT 30 days after the date filed (see **paragraph 2.3. below**), and mail a copy of the complaint to that office..
- Notify the counselor when a complainant files a complaint and ask the commander or a designee to appoint a management representative.

2.2. Commanders, or their designees (such as CCDs or other officials), may dismiss an individual complaint or part of a complaint at any time under the provisions of **29 CFR 1614.107 and EEO MD-110**. In handling dismissals, whether for the designated official or as the dismissal authority, CCDs must:

- Process them as promptly as possible.
- Write a dismissal letter that advises the complainant to furnish a copy of any appeal to AFCARO/ALO. When dismissing an issue because the complainant did not bring it forward in the pre-complaint process, the dismissal letter must advise the complainant to contact a counselor before proceeding with that issue. The dismissal letter must give reasons for the action, citing applicable sections and subsections of 29 CFR 1614.
- Mail a copy of the dismissal letter to AFCARO/ALO
- Send a copy of the dismissal letter to the EEOC district office if the complaint file has already gone forward to that office.
- Notify OCI if the complainant appeals dismissed issues after the CCD has requested an OCI investigation.
- Hold the complaint in abeyance pending a final EEOC decision if the complainant has appealed the dismissal
- Send the notice required by **29 CFR 1614.107 (f)** by regular and certified mail before dismissing a complaint because the complainant cannot be located.
- Express-mail proposed offers of full relief and a copy of the complete case file to AFCARO/ARD, who will evaluate offers and recommend approval/disapproval to SAF/GC who decides whether the offer will be certified.
- Make certified offers of full relief to complainants in writing and advise them that refusal of the offer will result in dismissal of the complaint.

2.3. Investigation (29 CFR 1614.108). The CCD requests an investigation from OCI. The request must include the following:

- Specific issues raised.
- Complete, unsanitized case file.
- Name, office symbol, address, and phone number of the management representative.

2.3.1. Investigators determine the scope and methodology of the investigation. They negotiate with the complainant for extensions to the 180-day time limit for processing complaints. CCDs, at the request of investigators, may act as intermediaries in these negotiations.

2.3.2. OCI provides a copy of the Report of Investigation (ROI) and the case file to the CCD.

2.3.2.1. Within 5 calendar days of receipt of the investigative file, the CCD provides a copy of

the sanitized file (e.g., deletes Social Security Numbers (SSNs) and home addresses), along with notification of options for further processing, to the complainant and the complainant's (attorney) representative, as required in **29 CFR Section 1614.605 (d)**. This notification and file will be delivered in person, if possible, or sent by U.S. Postal Service certified mail, return receipt requested, showing AFCARO/ARD as the return address on the PS Form 3811, Domestic Return Receipt (Obtain from Post Office).

- The notification advises the complainant of his or her rights under the provisions of **29 CFR 1614.108 (f) and 29 CFR 1614.110**. It advises the complainant s/he must request an EEOC hearing through the CCD who immediately data faxes any request to AFCARO/ARD. Further, the notice must state that if the complainant desires a final Air Force decision without an EEOC hearing, s/he must request it directly from AFCARO/ARD. AFCARO/ARD sends a copy of the request to the CCD for informational purposes.

2.3.2.2. Commanders or designees may meet to discuss the ROI with the complainant if they choose. Commanders or a designee may choose to resolve the complaint. If desired, the commander or a designee may issue a Position Paper on the ROI to the complainant. This position paper does not include appeal rights or a decision. A copy of this paper is included in the complaint file. Meetings and position papers are optional and anytime so expended does not extend the five days permitted in paragraph **2.3.2.1**. above.

2.3.3. CCDs will not honor untimely requests for hearings. CCDs will notify complainants in writing, with an information copy to AFCARO/ARD, that the request is untimely, that their complaint has been forwarded to AFCARO/ARD for final decision to

be issued within 60 days of the end of the 30-day period within which the hearing could have been requested, and that further appeal rights will be provided at that time.

2.3.4. CCDs immediately data fax any dismissal notice, settlement agreement, or withdrawal to AFCARO/ARD.

2.4. Hearing (29 CFR 1614.109). CCDs request EEOC hearings and make all needed arrangements as outlined in **EEO MD 110, Chapter 6**, including paying for a verbatim transcript of the proceeding.

2.4.1. The request to the EEOC district office that services their area will include:

- Instructions to send a copy of the EEOC findings and conclusions and two copies of the hearing transcript to AFCARO/ARD.
- The name, address and telephone number of the management representative
- A tabbed copy of the case file

2.4.2. CCDs mail a copy of the request for a hearing to AFCARO/ARD.

3. Settling a Complaint (29 CFR 1614.603). CCDs working with their SJAs and the complainant may settle the complaint at any stage in the process through negotiation, mediation or other approach. Investigators may also seek to resolve a complaint with the parties during the investigation.

3.1. The settlement agreement may include back pay, attorney's fees and compensatory damages.

3.2. If the settlement binds an organization outside the authority of the commander, the management representative must obtain the written concurrence of that organization before signing the agreement.

3.3. Before signing an agreement, the management representative must also obtain coordination of the civilian personnel flight on personnel actions to be taken as a result of the agreement. Such coordination does not include a decision on the merits of the case or on the settlement.

Section B—Processing Class Complaints (CFR 1614.204)

4. AFPOA/DPW develops personnel policy and oversees the processing of all class complaints of discrimination. AFPOA/DPW helps prepare the agency’s position statements and briefs in class complaint proceedings.

4.1. The Civilian Personnel Officer (CPO) personally serves or designates a staff member to serve as a point of contact for class complaints. The CPO also ensures that applicable personnel records are maintained while a class complaint is pending.

4.2. AFLSA/CLLO provides legal advice on all administrative class complaint matters and designates the agency representative for all administrative class complaints.

4.3. Pre-complaint Processing. An individual who wishes to file a class complaint must seek counseling and be counseled in accordance with **29 CFR 1614.105**. The CCD notifies AFPOA/DPW, AFLSA/CLLO, MAJCOM/DPC, and the base CPO and SJA, in writing, when a complainant files a class complaint. The notification must include the complainant’s name (if releasable), the name of the complainant’s representative, the docket number, the date of initial contact, identification of the class and issues raised.

4.3.1. When notified by the CCD, AFLSA/CLLO designates an attorney to represent the Air Force. The servicing SJA designates a local attorney to help the AFLSA/CLLO attorney.

4.3.2. The CCD tries to resolve individual allegations and personal concerns of the complainant. Before attempting to resolve class-wide issues the CCD must coordinate any proposed action with AFLSA/CLLO, AFPOA/DPW and the MAJCOM/DPC.

4.3.3. The CCD must coordinate the gathering and analysis of statistics with AFPOA/DPW and AFLSA/CLLO, **before** collecting the data.

4.3.4. Before the final interview with the complainant, the CCD prepares a draft report for coordination with the base SJA and CPO, the MAJCOM/DPC, AFPOA/DPW and AFLSA/CLLO.

4.4. Formal Class Complaint:

4.4.1. The complainant must file a formal class complaint with the CCD no later than 15 days after receipt of the final interview letter (**see EEO MD-110 for sample letter**). The class complaint must be signed by the agent or representative. It must identify the policy or practice adversely affecting the class as well as the action or matter adversely affecting the agent.

4.4.2. Upon receipt of a formal class complaint, the CCD forwards the original and one copy of the case file to AFLSA/CLLO, one copy to AFPOA/DPW and one copy to MAJCOM/DPC. The CCD also notifies the base CPO and SJA.

4.4.3. Within 30 days of receipt of the written formal complaint the Air Force representative, in coordination with AFPOA/DPW, forwards it to the EEOC district office with the counselor’s final report and the Air Force recommendation to accept or dismiss based on the criteria at **29 CFR**

1614.107 and 29 CFR 1614.204 (a) (2). Copies are sent to AFPOA/DPW, AFLSA/JACL, and the CCD. The agency submission asks EEOC to send its recommendation to AFPOA/DPW.

4.4.4. Within 30 days of receipt of the EEOC recommendation, SAF/GC in coordination with AFPOA/DPW issues the notice of final decision on complaint acceptance or dismissal to the class agent and sends copies of the decision to the CCD and the EEOC (**29 CFR 1614.204 (d) (7)**). If the Air Force does not issue a decision, the EEOC recommendations become the final Air Force decision.

4.4.5. When the CCD receives a complaint s/he believes is related to a pending class complaint, the CCD will inform AFPOA/DPW and AFLSA/CLLO of the issue(s) involved and the basis of the complaint, and provide a synopsis of the counselor's reasons for believing the complaint is related to a pending class complaint. Where appropriate, AFPOA/DPW and AFLSA/CLLO will provide guidance on processing complaints related to pending class complaints.

4.4.6. After SAF/GC or the EEOC accepts a class complaint, the appropriate Air Force activity will, under the direction of AFPOA/DPW and AFLSA/CLLO, notify class members of the acceptance of the complaint as outlined in **29 CFR 1614.204**.

4.4.7. The EEOC will hold a hearing of the accepted class complaint and issue a report of findings and recommendations to AFPOA/DPW (**29 CFR 1614.204 (h)**). The CCD makes arrangements for the hearing after the EEOC administrative judge has set a date for it.

4.4.8. AFPOA/DPW and AFLSA/CLLO are responsible for managing the processing of the complaint beyond that point. Processing will be in accordance with **29 CFR 1614.204 e through j**.

Section C—Processing Mixed Case Complaints (29 CFR 1614.302 and EEO MD-110 Chapter 3)

5. An individual may file a mixed case **appeal** through the MSPB process or a mixed case **complaint** using the EEO discrimination complaint system, but not both. Whatever action the complainant files first is considered the election. Merely receiving pre-complaint counseling does not constitute an election; a complaint must be filed to restrict the complaint to the EEO system.

5.1. Processing of mixed case pre-complaints and complaints will be in accordance with **29 CFR 1614.105, 106,107 and 108 (a) through (e)**.

5.1.1. When a complaint is accepted, CCDs advise the complainant that if a decision is not issued within 120 days of filing the mixed case complaint, the complainant may appeal the matter to the MSPB as specified at 5 CFR 1201.154 (a) or file a civil action as specified in 29 CFR 1614.310 (g) but not both (**29 CFR 1614.302 (d) (1) (i)**).

5.1.2. Upon completion of the investigation, CCDs advise the complainant that a final decision will be issued within 45 days without a hearing.

5.1.3. When issuing a final Air Force decision, AFCARO will advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 20 days and the right to file a civil action as provided at 29 CFR 1614.301 (a) (**29 CFR 1614.302(d) (3)**).

5.2. Dismissal of a mixed case complaint on the basis of prior election of a mixed case appeal is as follows:

- If neither the MSPB nor the Commander or his/her designee dispute MSPB jurisdiction, the Commander, or CCD, or a designee dismisses the complaint in accordance with **29 CFR.1614.107 (d)**. The dismissal letter will advise the complainant to notify the MSPB of the allegations of discrimination contained in the rejected complaint pursuant to 5 CFR 1201.155. It also advises the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue (**29 CFR.302 (c) 92) (i)**).
- If the Commander or his/her designee or the MSPB questions the MSPB jurisdiction, the CCD will hold the mixed case complaint in abeyance until the MSPB administrative judge rules on the jurisdictional issue. The CCD notifies the complainant of the action being taken and instructs him or her to bring the allegation of discrimination to the attention of the MSPB.
- If MSPB finds it has jurisdiction over the matter, the Commander or designee shall dismiss the mixed case complaint pursuant to **29 CFR 1614.107 (d)**. The CCD advises of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue.
- If MSPB determines it does not have jurisdiction over the matter, the CCD recommences processing of the mixed case complaint as a non-mixed case EEO complaint.

Section D—Appeals and Requests for Reconsideration

6. The agency's comments on an appeal or a request for reconsideration as well as the agency's requests for reconsideration should reflect the views of the Air Force and be suitable for submission to the EEOC without change. Installations must coordinate comments on appeals and reconsideration of individual complaints with AFCARO/ALO and may not send these comments directly to EEOC/OFO. They must submit requests for reconsideration by data fax to reach AFCARO/ARD no later than 21 calendar days from the date AFCARO/ALO received the appeal decision. AFCARO/ARD will evaluate proposed requests and recommend approval/disapproval to SAF/MIB, who decides whether the petition will be submitted. AFCARO/ARD will advise the CCD and serve copies of any requests submitted to EEOC. The provisions of this paragraph do not pertain to appeals and requests for reconsideration of class complaints.

Section E—Reports (EEO MD-110, CHAPTER 11)

7. MAJCOM/DPCs will provide a consolidated, accurate and complete EEOC Form 462, Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints, (IRCN: 0288-EEO-AN) to AFPOA/DPW no later than the 15th of October of each year.

Section F—Air Force Civilian Personnel Management Center

8. Management officials must coordinate with AFCPMC/DPC and DPO actions on any individual complaint, class complaint appeal, and request for reconsideration that involves a Career Program position, process, procedure, or AFCPMC in any manner. Failure to do so could result in improper determinations and disposition.

8.1. Complaint-processing officials must provide to AFCPMC/DPO all reports, at the earliest opportunity, for review and comments.

8.2. All complaint resolutions and settlements involving AFCPMC must be coordinated with and approved by AFCPMC/DPC and DPO to be recognized as valid agreements.

Section G—Compliance with Settlement Agreements and Final Decisions 29 CFR1614.504

9. If the complainant believes that the Air Force has failed to comply with the terms of a settlement agreement or final decision, the complainant shall notify the Commander or designee in writing within 30 days of the date s/he became aware of the alleged noncompliance.

9.1. The Commander or designee should earnestly attempt to resolve the matter of concern and respond to the complainant, in writing, of the findings within 30 days of receiving the complainant's allegation . The letter must advise the complainant the he or she may appeal the decision to the EEOC for a determination as to whether the terms of the agreement have been adhered to (**29 CFR 1614.505.(b)**).

Section H—Forms Prescribed by this Instruction

10. DD Form 2655, Complaint of Discrimination in the Federal Government. The form used to file a formal complaint discrimination complaint. This form replaces AF Form 1790.

10.1. EEOC Form 462, Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaint. The form used to report on pre-complaint counseling, formal complaint processing and disposition of EEO complaints. This form replaces AF Forms 1791, 1792, 1793 and 1794.

BILLY J. BOLES Lieutenant General, USAF
Deputy Chief of Staff, Personnel

Attachment 1

TERMS, DEFINITIONS AND ABBREVIATIONS USED IN THIS INSTRUCTION

Secretary of the Air Force, Office of the General Counsel (SAF/GC)--The office designated to certify offers of full relief and accept or reject class complaints.

Chief Counselor--The person a commander appoints to manage the part of the complaint program controlled by the commander and to coordinate complaint processing activities for which the commander is responsible. The chief counselor (CCD) reports directly to the commander on complaint processing.

EEO Counselor--A person appointed by the commander to make informal inquiries and seek resolution of informal complaints. Counselors report to the Chief counselor.

Civilian Personnel Flight--The office responsible for administration of the civilian personnel program at the installation level.

Civilian Personnel Officer (CPO)--The person who manages the Civilian Personnel Flight (CPF).

Class--A group of employees, former employees, or applicants for employment who allegedly have been or are being harmed by an agency's personnel management, policy, or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age, or disability.

Class Agent--Class member who acts for the class during the processing of the class complaint.

Commander (CC)--The commander with appointing authority.

Compensatory damages--Payments intended to fully compensate victims of intentional discrimination for pecuniary and non-pecuniary losses, as well as intangible injuries that result directly from it. These damages are in addition to other equitable relief such as back pay, reinstatement' and attorney's fees.

Complainant--An employee, former employee, or applicant for employment who files a formal complaint of discrimination.

Deputy for Air Force Review Boards (SAF/MIB)--The position with delegated authority from the Secretary of the Air Force to make final agency decisions on individual complaints of discrimination.

Discrimination--An unlawful employment practice that occurs when an employer fails or refuses to hire, discharges, or otherwise discriminates against any individual with respect to compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, national origin, age, reprisal, physical or mental disability; limits, segregates or classifies employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his/her status as an employee because of race, color, religion, sex, national origin, reprisal, physical or mental disability.

Office of Complaint Investigation (OCI)--The Department of Defense (DOD), Civilian Personnel Management Service, responsible for investigating all EEO complaints and discrimination for DOD agencies.

Equal Employment Opportunity Commission (EEOC)--The federal agency responsible for conducting hearings and issuing recommended decisions, as well as enforcing compliance with section 717 of Title VII of the Civil Rights Act of 1964, as amended; sections 501 and 505 of the Rehabilitation Act of 1973, as amended; section 15 of the Age Discrimination in Employment Act of 1977, as amended; and the Equal Pay Act, section 6(d) of the Fair Labor Standards Act of 1938, as amended.

Major Command (MAJCOM)--The next higher echelon, or designated channel, above the servicing CPF, to which a Director of Civilian Personnel is assigned. (Command and command level mean the same here.)

Merit Systems Protection Board (MSPB)--The federal agency responsible for holding hearings and issuing decisions on complaints or appeals about personnel actions appealable to the MSPB that also contain allegations of discrimination, i.e., mixed cases.

Mixed Case Appeal--A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

Mixed Case Complaint--A mixed case complaint is a complaint of employment discrimination based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

Official Correspondence--Those documents issued during the complaint process containing decisions or rights to proceed.

Sexual Harassment--Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Staff Judge Advocate (SJA)--Installation official delegated to manage the legal support activity.